Supreme Court U.S.
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No.

IN THE

Supreme Court of the United States

SAMUEL CLAYTON, JR., M.D.,

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF WELFARE, by and through their Agent, Estelle Richman, Secretary, Department of Public Welfare; HARRISBURG STATE Hospital, by and through their agent, Dr. Ann Shemo, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a "GVR" (Grant/Vacate/Remand) Order issue ordering that the Third Circuit Court of Appeals reconsider its decision in light of the Lilly Ledbetter Fair Pay Act of 2009, a recently-enacted retroactive change in the law?

Suggested answer: Yes

PARTIES TO THE PROCEEDING

A. Petitioner

Petitioner is Samuel Clayton, Jr., M.D., a plaintiff in a race discrimination suit filed in the United States District Court for the Middle District of Pennsylvania.

B. Respondents

Respondents are Pennsylvania Department of Welfare, by and through its Agent, Estelle Richman, Secretary, Department of Public Welfare and Harrisburg State Hospital, by and through it agent, Dr. Ann Shemo, Medical director, Pennsylvania Department of Public Welfare, Harrisburg State Hospital.

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OPINIONS BELOW

Petitioner seeks review of the December 22, 2008 decision of the Third Circuit affirming the decision of the United States District Court for the Middle District of Pennsylvania granting summary judgment. On February 3, 2008, the Third Circuit denied a petition for *en banc* rehearing.

The opinions below include:

Opinion of United States Court of Appeals for the Third Circuit (Ambro, J) (Appendix B, A 3a.) dated December 22, 2008. This opinion is reported at *Clayton v. Pa. Dep't of Welfare*, 304 Fed. Appx. 104 (3d Cir. 2008).

Opinion of the United States District Court for the Middle District of Pennsylvania (Jones, J.) (Appendix C, A. 13a) dated June 18, 2007 denying reconsideration of its grant of summary judgment. This opinion is not officially reported.

Opinion of United States District Court for the Middle District of Pennsylvania (Jones, J.) dated February 20, 2007. (Appendix D, A. 31a) This opinion is not officially reported. It is unofficially reported at *Clayton v. Pa. Dep't of Pub. Welfare*, 2007 U.S. Dist. LEXIS 11840 (M.D. Pa. Feb. 20, 2007).

STATEMENT OF JURISDICTION

The Order denying Rehearing En Banc was entered by the United States Court of Appeals for the Third Circuit on February 3, 2009. Pursuant to Supreme Court Rule 13.3, the ninety-day period expires May 4, 2009. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

42 U.S.C. § 2000e-5(d)(3)(A)

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Petitioner, Samuel Clayton, Jr., M.D., is a physician who is of African descent. He was, at all relevant times, a part-time physician employee of the Harrisburg State Hospital (hereinafter referred to as "HSH"), which was operated by the Commonwealth of Pennsylvania, Department of Public Welfare. During the relevant periods of time, he was the only African American staff physician at HSH. Defendant, Estelle Richman, was the Secretary of the Commonwealth Department of Public Welfare. Ann Shemo, M.D. was the medical director of HSH, which is no longer in operation.

In 1985, Dr. Clayton was solicited to work as a part-time staff physician at HSH. Other Caucasian staff physicians at HSH were able to supplement their earnings through an "on-call" program, pursuant to which they earned extra compensation for being "on-call" even while not physically present at the hospital. Dr. Clayton, was, however, excluded from this program from 1985 until June 1997, when, after twelve years of total exclusion, he was for the first time invited to participate in the "on-call" program. Despite assurances that he would be equally utilized for on-call hours, beginning in July 1997, his on-call hours were reduced. Over the next few years, management and the union offered various inconsis-

tent, conflicting and unsubstantiated reasons for the reduction in hours. Dr. Clayton consistently challenged the disparate treatment.

On August 23, 1999, Robert Davis, M.D., who, though part-time, was the top ranking management physician, circulated a policy memorandum that all physicians who participated in the "on-call" program would participate equally, regardless of whether they were part-time or full-time employees. Caucasian members of the physicians' union disagreed with this policy. Under pressure from the union, the equal "on-call" system was rescinded on October 18, 1999. Instead, defendant purported to institute a "pro-rata" approach to the allocation of on-call hours, pursuant to which part-time employees would receive 50% share of the available on-call hours. Petitioner, Dr. Clayton, challenged the assertion that he received even his 50% on-call hours. State auditors were unable to confirm the defendants' assertion that they were administering the on-call system as they alleged. Dr. Clayton resigned from his employment at the hospital on September 26, 2003. He asserts that he was forced to resign from his employment to escape being singled out and subjected to hostile indignities and humiliation at every turn arising out of, among other things, denial of his appropriate share of on-call time, arbitrary removal of his office furniture without his knowledge or permission, relocation of his office away from other physicians, removal of his name from the hospital

directory, removal of his mailbox location away from other physicians, threatened criminal action, change in work schedule, threatened furlough, protracted delay of payment of wages and benefits, and denial of bonus payments—because of his race.

PROCEDURAL HISTORY

Petitioner filed a complaint with the Pennsylvania Human Relations Commission on February 13, 2001, alleging various forms of discrimination. On March 6, 2001, Petitioner dual filed an Amended Complaint with the EEOC raising various allegations of discrimination. On January 13, 2005, the EEOC issued a Right to Sue Letter. Petitioner filed a complaint in the United States District Court for the Middle District of Pennsylvania on April 15, 2005. Petitioner filed an Amended Complaint on April 22, 2005. The parties conducted discovery from April 19, 2005 through October 30, 2006.

On October 6, 2006, defendant filed a motion for summary judgment. Petitioner filed a responding brief and documents on December 8, 2006. Petitioner submitted additional documents by leave of court on December 14, 2006. Defendant submitted a reply brief on January 17, 2007.

The District Court granted summary judgment on February 20, 2007.

Petitioner filed a motion for reconsideration on March 5, 2007. Defendants filed an answering brief

on March 26, 2007. On June 18, 2007, the District denied the motion for reconsideration.

Petitioner filed a Notice of Appeal on July 18, 2007. On December 22, 2008, the United States Court of Appeals for the Third Circuit issued an opinion affirming the District Court. On January 20, 2009, petitioner filed a petition for rehearing *en banc*.

On February 3, 2009, the United States Court of Appeals for the Third Circuit denied the petition for rehearing *en banc*.

REASONS FOR GRANTING WRIT

This petition for writ of certiorari seeks a "GVR" (Grant/Vacate/Remand) Order on the ground that after the Third Circuit decided the case below and denied rehearing, Congress **retroactively changed** the applicable law by enacting the Lilly Ledbetter Fair Pay Act of 2009 and thereby invalidated the decisions of the District Court and Third Circuit Court of Appeals. Both the District Court and the Third Circuit held that plaintiff's action under Title VII was time barred because the action accrued in October 1999, when defendant made the discriminatory decision, thus requiring that he file with the EEOC in June 2000. Plaintiff did not file an EEOC complaint until March 2001. The Third Circuit rejected the argument that every discriminatory paycheck is a Title VII violation, citing to this Court's opinion in *Ledbetter v. Goodyear Tire & Rubber co., Inc.*, 550 U.S. 618 (2007).

However, when it enacted the Lilly Ledbetter Fair Pay Act of 2009, Congress retroactively overturned *Ledbetter*. Therefore, the decisions below are invalid, and this Court should grant a GVR order remanding this case to the Third Circuit for reconsideration in light of the retroactive annulment of the authority upon which it relied.

I. THIS COURT HAS STATUTORY AUTHORITY TO GRANT A GVR ORDER.

This Court has the broad power under 28 U.S.C. § 2106 to grant a GVR order: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." In *Lawrence v. Chater*, 516 U.S. 163, 166 (U.S. 1996), this Court noted that the exercise of our GVR power was, until recent times, rare. However, the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. It is used in a variety of developments including this Court's own decisions, state supreme court decisions, new federal statutes, new state statutes, administrative reinterpretations of federal statutes, and confessions of error by the Solicitor General. *Id.* at 166. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that **the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration,** and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Id.* at 167 (Emphasis added).

In his dissenting opinion, Justice Scalia faulted the majority for expanding the GVR procedure beyond its traditional boundaries. He identified three narrow circumstances in which this Court could, consistent with the traditional understanding of its appellate jurisdiction justify vacating a lower court's judgment without first identifying error: "(1) where an intervening factor has arisen [e.g., new legislation or a recent judgment of this Court] that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan v. Long*, 463 U.S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below." 516 U.S., at 191-192 (dissenting opinion). See also: *Youngblood v. West Virginia*, 547 U.S. 867, 871 (U.S. 2006) (dissenting opinion).

A GVR order is neither an outright reversal nor an invitation to reverse. Rather, it is an invitation for the lower court, which rendered its decision without the benefit of an intervening clarification, to reconsider that decision and, if warranted, to revise or correct it. See *Gonzalez v. Justices of the Mun. Court*, 420 F.3d 5, 7 (1st Cir. 2005). The GVR order itself does not constitute a final determination on the merits; it does not even carry precedential weight. See *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Indeed,

Justice Scalia proposed that the GVR be called "no fault V & R" because it represents a "vacation of a judgment and remand without any determination of error in the judgment below." *Lawrence*, 516 U.S. at 178 (Scalia, J., dissenting).

It is clear that this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982)(Rehnquist, J., dissenting), quoting Vinson, C.J., address before American Bar Association September 7, 1949, *quoted in* R. STERN & R. GRESSMAN, SUPREME COURT PRACTICE 258 (5th ed. 1978). However, the GVR procedure is a laudatory exception to this general principle. A GVR order may and should issue when the law changes retroactively after the lower court has ruled.

II. A GVR ORDER SHOULD ISSUE BECAUSE NEW LEGISLATION, NOT IN FORCE WHEN THE THIRD CIRCUIT RULED, HAS RETROACTIVELY OVERTURNED THE BASIS OF THAT OPINION.

This Court should grant a GVR order because even under the first of the "traditional" criteria addressed by Justice Scalia, an intervening factor in the form of "new legislation," i.e., a retroactive amendment of the statute, has arisen and has invalidated the decisions of the Third Circuit and the District Court. When it affirmed the District Court's grant of sum-

mary judgment, the Third Circuit held that this Court's

> recent decision in *Ledbetter v. Goodyear Tire & Rubber co., Inc.*, 550 U.S. 618 (2007), forecloses the argument that each paycheck Dr. Clayton received constituted a new and separate violation of Title VII. The Court in Ledbetter stated that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination." *Id.* at 2169. The Hospital made the decision to reduce Dr. Clayton's--and all other part-time physicians'--on-call time in October 1999.

Clayton v. Pa. Dep't of Welfare, 304 Fed. Appx. 104, 108 (3d Cir. Pa. 2008) (Appendix A, A.8a – 9a).

However, the *Ledbetter* decision prompted Congress to pass the "Lilly Ledbetter Fair Pay Act of 2009," which became law on January 29, 2009. Pub. L. No. 111-2, 123 Stat. 5. When it enacted this Act, Congress found that this Court's decision in *Ledbetter* was contrary to its intent and must be reversed:

> **Lilly Ledbetter Fair Pay Act of 2009**; findings. Act Jan. 29, 2009, P.L. 111-2, § 2, 123 Stat. 5 (**effective as if enacted on 5/28/2007**, and applicable as provided by § 6 of such Act, which appears as a note to this section), provides:

"Congress finds the following:

"(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), **significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.** The Ledbetter decision **undermines** those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, **contrary to the intent of Congress**.

"(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

"(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

"(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.".

42 U.S.C. § 2000e-5 (Emphasis added). This Act amends Title VII by adding the following provision to 42 U.S.C. § 2000e-5 (e):

> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

The Act was to "take effect **as if enacted on May 28, 2007**," and is to "apply to all claims of discrimination in compensation under title VII ... that are **pending on or after that date**."

Dr. Clayton filed his action in 2005, and the matter was "pending" before the courts on and after May 28, 2007. Therefore, the new statutory provision is retroactive and governs the instant case. Furthermore, it is an "intervening factor" in the form of "new legislation" that should result in a GVR order pursuant to 28 U.S.C. § 2106.

Simply stated, the central foundation of the Third Circuit's decision is no longer legally binding. Congress changed the law retroactively after the Third Circuit ruled. This Court should enter a GVR order and remand this case to the Third Circuit with instructions that it reconsider its decision in light of the Lilly Ledbetter Fair Pay Act of 2009.

CONCLUSION

The petition for writ of certiorari should be granted, the Order of the United States Court of Appeals for the Third Circuit vacated, and the matter remanded to the Third Circuit for reconsideration on the merits in light of the Lilly Ledbetter Fair Pay Act of 2009.

Respectfully submitted,

Robert S. Mirin, Esq.

Attorney for Petitioner,
Samuel Clayton, Jr., M.D.

APPENDIX

APPENDIX A – SUR PETITION FOR EN BANC REHEARING, DATED FEBRUARY 3, 2009

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3171

SAMUEL CLAYTON, JR., M.D.,
Appellant

v.

PENNSYLVANIA DEPARTMENT OF WELFARE, by and through their Agent, Estelle Richman, Secretary, Department of Public Welfare; HARRISBURG STATE Hospital, by and through their agent, Dr. Ann Shemo, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital

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(D.C. Civil Action No. 05-cv-00768)

Present: SCIRICA, Chief Judge, SLOVITER, MCKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GREENBERG*, Circuit Judges, and O'NEILL**, District Judge

SUR PETITION FOR *EN BANC* REHEARING

The petition for hearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,
/s/ Thomas L. Ambro, Circuit Judge

Dated: February 3, 2009

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* Senior Judge Greenberg is limited to panel rehearing only.

** Honorable Thomas N. O'Neill, Jr., Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation is limited to panel rehearing only.

APPENDIX B – OPINION FILED DECEMBER 22, 2008

NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3171

SAMUEL CLAYTON, JR., M.D.,
Appellant

v.

PENNSYLVANIA DEPARTMENT OF WELFARE, by and through their Agent, Estelle Richman, Secretary, Department of Public Welfare; HARRISBURG STATE Hospital, by and through their agent, Dr. Ann Shemo, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital

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Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 05-cv-00768)
District Judge: Honorable John E. Jones, III

Submitted Under Third Circuit LAR 34.1(a)
December 2, 2008

Before: AMBRO and GREENBERG, Circuit Judges, and O'NEILL,** District Judge

(Opinion filed: December 22, 2008)

OPINION

AMBRO, Circuit Judge

Samuel Clayton, Jr., M.D. appeals the District Court's grant of summary judgment to Estelle Richmar, Ann Schemo, M.D., and the Pennsylvania Department of Public Welfare on (1) his claim of racial discrimination under 42 U.S.C. § 951 et seq.; (2) his retaliation claim under 42 U.S.C. § 1981, Title VII, and the PHRA; and (3) his hostile work environment and constructive discharge claims. For the following reasons, we affirm.

I.

Because we write only for the benefit of the parties, our recitation of the facts is brief. Dr. Clayton is an African-American physician who was employed part-time from 1985

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* Honorable Thomas N. O'Neill, Jr., Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation

until his retirement in 2003 at Harrisburg State Hospital ("the Hospital"), a mental health facility operated by the Pennsylvania Department of Public Welfare. Estelle Richman is and has been the Secretary of Public Welfare in Pennsylvania since 2003. Dr. Ann Shemo was the Medical Director at Harrisburg State Hospital from March 2000 until September 2004.

Dr. Clayton filed a charge with the Pennsylvania Human Relations Commission in February 2001 alleging an improper change in his work schedule. In March 2001, he filed an amended charge with the Equal Employment Opportunity Commission ("EEOC"), complaining of multiple discriminatory incidents. The EEOC issued a right-to-sue letter in January 2005, after which Dr. Clayton filed his complaint in the District Court.

In his complaint, Dr. Clayton Claimed that he suffered the following individual incidents of discrimination and retaliation between 1999 and 2003: (1) the Hospital reduced his on-call time after a brief period of equalizing on-call hours between full-time and part-time physicians; (2) the Hospital advised him that he might be furloughed to make way for another physician; (3) the Hospital changed his work schedule in a way that interfered with his private practice; (4) the Hospital, at the direction of Dr. Shemo, moved his mailbox to a new administrative

building approximately one month before moving all other physicians' mailboxes; (5) the Hospital denied him a specialty board certification bonus; (6) the Hospital removed a second desk from his office for restoration without requesting his consent; (7) Dr. Shemo did not provide him with the specific office she had promised to him; (8) the Hospital neglected to pay him step-cash payments; and (9) the Hospital failed to respond timely to filed grievances. *See Clayton v. Pennsylvania Dep't of Public Welfare*, No. 4:CV 05-0768, WL 575677, *2–4 (M.D. Pa. Feb. 20, 2007).

The District Court rejected all of Dr. Clayton's claims. As a preliminary matter, it dismissed Ms. Richman as a party, limited Dr. Shemo's liability to claims under § 1981, and dismissed Dr. Clayton's PHRA and § 1981 claims against the Department of Public Welfare. *See id.* at *4–6. The Court also concluded that all of Dr. Clayton's PHRA claims, with the exception of his change in work schedule allegation, were barred for failure to exhaust. *See id.* at *7–8. It determined as well that the statute of limitations barred Dr. Clayton's Title VII on-call-hours claim and all but three of his § 1981 claims. *See id.* at *14–15.

Addressing the merits of Dr. Clayton's discrimination and retaliation claims (including those barred by statute), the District Court held that Dr. Clayton could not Make out a *prima jacie* case because he could not establish that he suffered an adverse employment action or was subject to a hostile work en-

vironment or constructively discharged. *See id.* at *8–13. The Court noted that Dr. Clayton failed to show that similarly situated members of other races were treated more favorably than he was, or that there was any discriminatory or retaliatory motive behind the Hospital's or Dr. Shemo's actions *See id.*

The Court reaffirms its conclusions in a denial of Dr. Clayton's motion for reconsideration in June 2007. *See* App. At 4a–20a. Dr. Clayton thereafter timely appealed.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. When the District Court grants a motion for summary judgement, our review is plenary. *See Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412, 416 (3d Cir. 2008) Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *See Celotes Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). We resolve all factual doubts and draw all reasonable inferences in favor of the non-moving party. *See DL Res., Inc. v. FirstEngergy Solutions Corp.*, 506 F.3d 209, 216 (3d Cir. 2007).

III.

Dr. Clayton argues that the District Court erred in concluding that (1) his Title VII on-call-hours claim was time barred, (2) he had not presented sufficient

evidence of discrimination or retaliatory behavior to defeat summary judgment on his individual discrimination allegation, and (3) he could not establish a claim for a hostile work environment or constructive discharge.

We consider first whether the District Court erred in determining that Dr. Clayton's claim that the Hospital reduced his on-call time for discriminatory reasons was time barred. Title VII requires a claimant to file a charge with the EEOC within 300 days of the allegedly unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). The Court found that Dr. Clayton's claim of discrimination regarding his on-call time accrued in October 1999 and was barred after June 2000—nine months before his March 2001 filing with the EEOC. *See Clayton*, 2007 WL 575677, at *13. Dr. Clayton retorts that his allotment of reduced hours represented a continuing violation that did not accrue until his departure from the Hospital in 2003. He explains that "this is a 'paycheck' case, and every discriminatory paycheck represents a violation of Title VII." Clayton's Br. At 16; *see also id.* at 44–45 (citing *Bazemore v. Friday*, 478 U.S. 385, 395–96 (1986)). We disagree.

The Supreme Court's recent opinion in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 127 S.Ct. 2162, 2166–72 (2007), forecloses the argument that each paycheck Dr. Clayton received constituted a new and separate violation of Title VII. The Court in *Ledbetter* stated that "[a] new violation does not

occur, and a new charging Period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination." *Id.* at 2169. The Hospital made the decision to reduce Dr. Clayton's—and all other part-time physician's—on-call time in October 1999. *See Clayton*, 2007 WL 57677, at *13. This was a discrete employment decision, about which Dr. Clayton complained to his superiors but did not file a timely EEOC complaint. *See* Clayton's Br. At 42. He thus forfeited his opportunity to file a Title VII complaint regarding his allocation of on-call time, and he cannot now rely on his paychecks to "breathe life into prior, uncharged discrimination." *Ledbetter*, 127 S.Ct. at 2169; *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–14 (2202).

We next review the merits of Dr. Clayton's individual discrimination claims. To establish a *prima facie* case of racial discrimination or retaliation under Title VII, § 1981, or the PHRA, a claimant must, among other things, demonstrate that he was subject to an adverse employment action. *See Jones v. Sch. Dist. Of Phila.*, 198 F.3d 403, 410–11 (3d Cir. 1999). The District Court held that Dr. Clayton failed to satisfy this requirement because he did not show that he suffered an "action y [his] employer that [was] serious and tangible enough to alter [his] compensation, terms, conditions or privileges of employment." *Clayton*, 2007 WL 575677, at *8 (quoting *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764

(3d Cir. 2004) (internal quotations omitted)). Our reading of the record confirms that Dr. Clayton is unable to prove that he was subjected to a discriminatory or retaliatory employment action through any of the individual incidents recounted in his claim. We thus have nothing to add to the District Court's thorough analysis, *see Clayton*, 2007 WL 575677, at *8–12; App. At 7a–`5a, and we affirm its determination that Dr. Clayton has not raised issues of material fact necessary to survive a motion for summary judgment. *See O'Conner v. Consol. Coin Caterers, Corp.*, 517 U.S. 308 312 (1996).

We conclude by considering the District Court's rejection of Dr. Clayton's hostile work environment and constructive discharge claims. To prevail on a hostile work environment claim under Title VII and the PHRA, Dr. Clayton must show that (1) he suffered intentional discrimination because of his race, (2) the discrimination was severe or pervasive, (3) this detrimentally affected him, (4) it would have detrimentally affected a reasonable person in like circumstances, and (5) a basis for employer liability is present. *See Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006). Viewing all of the facts in the light most favorable to Dr. Clayton, we conclude that he cannot satisfy this showing because there is no evidence that he suffered intentional discrimination because of his race or that such discrimination was severe or pervasive. The record has nine alleged incidents of discrimination spread over a five-year period. None

of these incidents was severe or pervasive in nature, and none was shown by Dr. Clayton to have been racially motivated. Accordingly, the District Court was correct to deny Dr. Clayton's hostile work environment claim.

To establish constructive discharge, Dr. Clayton must show that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3d Cir. 1996) (internal quotations omitted). Because Dr. Clayton has failed to present any evidence of racial discrimination, however, he cannot satisfy this requirement. The District Court thus properly granted summary judgment on this claim as well. *Cf. Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161–62 (3d Cir. 1993) (holding that objective proof of discrimination is required to sustain an allegation of constructive discharge)

IV.

For these reasons, we affirm the District Court's grant of summary judgment.

APPENDIX C – MEMORANDUM AND ORDER, DATED JUNE 18, 2007

IN THE UNITED STATES DISTRICT COURT
FOUR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL CLAYTON, Jr., M.D., No. 4:CV 05-0768

Plaintiff, Judge Jones

v.

PENNSYLVANIA DEPARTMENT OFPUBLIC WELFARE, by and Through Their agent ESTELLE RICHMAN, Secretary Department of Public Welfare, At HARRISBURG STATE HOSPITAL By and through their agent, DR. ANN SHEMO, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,

Defendants

MEMORANDUM AND ORDER

June 18, 2007

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

Pending before the Court is Plaintiff's Motion for Reconsideration of Summary Judgment in Accord with Rule 7.10 (doc. 69)("the Motion") filed on March 5, 2007. For the reasons that follow, the Motion shall be denied.

PROCEDURAL HISTORY:

Plaintiff Samuel Clayton, Jr., M.D.("Plaintiff" or "Clayton") commenced this action by filing a complaint (doc. 1) on April 15, 2005. Thereafter on April 22, 2005, Plaintiff filed an amended complaint (doc. 3), to which Defendant filed an answer (doc. 16) on July 6, 2005.

In Count I of the complaint, Plaintiff claims that he was discriminated against on the basis of his race in violation of 42 U.S.C. § 1981. In Count II of the complaint, Plaintiff claims he was discriminated against on the basis of his race as well as retaliated against for his complaints of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2001 et seq. In Count III of the complaint, Plaintiff claims he was discriminated and

retaliated against in violation of the Pennsylvania Human Relations Act, 43Pa. C. S. § 951 et seq. In Count IV of the complaint, Plaintiff claims that he was retaliated against as a consequence of his internal and EEOC complaints, in violation of § 1981. In the prayer for relief, Plaintiff seeks judgment for back pay, lost compensation, attorney fees and monetary relief, plus costs and interest.

Following the close of discovery, the Defendants filed a motion for summary judgment on October 6, 2006. (Rec. Doc. 36). On February 20, 2007 we entered a Memorandum and Order granting the Defendants' motion for summary judgment and closing the case. (Rec. Docs. 67 and 68).

On March 5, 2007, Plaintiff filed the instant Motion. The Motion has been fully briefed and is therefore ripe for our review.

STANDARD OF REVIEW:

Motion for reconsideration should be granted sparingly as federal courts have a strong interest in the finality of judgments. Burger King Corp. v. New] England Hood & Duct Cleaning Co., 2000 U.S. Dist. LEXIS 1022, at *2 (E.D. Pa. 2000). "The purpose of a motion for reconsideration ... is to correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986)). "Accordingly, a judg-

ment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id. (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." Abu-Jamal v. Horn, 2001 WL 1609761, at *9 (E.D. Pa. 2001).

FACTUAL BACKGROUND:

The factual background in this matter is well-known to the Court and the parties, and accordingly we shall just incorporate by reference the factual background as stated in our February 20, 2007 Memorandum. (Rec. Doc. 67).[1]

DISCUSSION:

The Plaintiff presents the Court with several arguments in support of his Request for reconsideration of the summary judgment in Defendants' favor.

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[1]To the extent that Plaintiff disputes the Court's interpretation of the facts, the same shall be discussed *infra*.

We shall discuss each in turn

1. On-Call Time

Plaintiff disagrees with our ruling that Harrisburg State Hospital's allocation of on-call time was not discriminatory. Plaintiff's argues that a genuine issue of material fact remains regarding the on-call allocation and that the policy was applied adversely to Plaintiff because he is African-American. Plaintiff's argument on this point is no different from the argument presented by him on the summary judgment motion.

We ruled that Plaintiff's failure to receive on-call time equal to a full-time physician was not based on racial discrimination but was due to Plaintiff's status as a part-time physician. We noted the testimony of Dr. Davis, a white part-time physician, who state that he never received on-call time equal to the full-time physicians and that on-call time was always doled out on a prorated basis.

Simply stated, Plaintiff disagrees with our interpretation of the Hospital's on-call policy that is unfavorable to him. We do not conclude that we have made a "manifest error" of fact on this point, nor does Plaintiff present us with any new Facts to support his argument other than a reiteration of his previous points.

2. Furlough

Plaintiff argues that the court failed to consider that because the Hospital's Furlough notification prompted him to use leave he otherwise would not have Taken, a jury could find that the furlough notification constituted an adverse employment action. Plaintiff vaguely argues that "a reasonable jury could find that the circumstances of the furlough showed different treatment afforded to Plaintiff and constituted adverse employment action." (Rec. Doc. 76 at 20).

Plaintiff again has cited *no* authority in support of his proposition that being told of an impended furlough which caused him to use leave time constitutes an "adverse employment action." As correctly summarized in our February 20, 2007 Memorandum:

> In order to establish claims for retaliation or discrimination under Title VII, §1981 or the PHRA, an essential element for the plaintiff to establish is that he was subject to an adverse employment action. See Jones v. School Dist. of Philadelphia, 198 F.3d 403-410-412 (3d Cir.1999).[2] In a discrimina-

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[2]To establish a prima facie claim of employment discrimination, a plaintiff must Demonstrate that: (1) he is a member of a protected class, (2) that he was subject to an adverse employment action, and (3) that similarly si-

> tion case, the Supreme Court has defined an adverse employment action as "[a] tangible employment action constitute[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits ... A tangible employment action in most cases inflicts direct economic harm." Burlington Industries, Inc. v. Ellerth,524 U.S. 742, action under Title VII as an "action by an employer that is 'serious and tangible enough to alter an employee's compensation, terms, conditions or privileges of employment.'" Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004)(quoting Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001)).

(Rec. Doc. 67 at 19-20).

Plaintiff is attempting to argue that the threatened furlough caused him direct economic harm because it motivated him to use leave he otherwise would not have used. We find this argument to be strained for several reasons. First, Plaintiff was *not* ultimately furloughed. Second, Plaintiff was not re-

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tuated members of other racial classes were treated more favorably. See Jones, 198 F.3d at 410-412.

quired to or forced to use the leave time because furlough was threatened. Third, there is simply no evidence that Defendants were aware that the threat of furlough would cause Plaintiff to use the leave time or that the Defendants were motivated to threaten furlough so that Plaintiff would use up his leave. Plaintiff does not show *any* direct harm caused by the threat of furlough that rises to the level contemplated by the Supreme Court and the Third Circuit in their definition of an "adverse employment action."

Furthermore, Plaintiff's argument that a reasonable jury could find that the threat of furlough was applied differently to Plaintiff in a discriminatory fashion is completely unsupported. Plaintiff has shown no differential treatment between himself and others regarding furlough decisions. What Plaintiff seems to forget is that he was *not* furloughed, and while he may have thought he was going to be and been put in a stressful situation because of that thought this *does not*, on its own, rise to the level of discrimination. Plaintiff's arguments on this point necessarily fail.

3. Change in Work Schedule

In our February 20, 2007 Memorandum we rejected Plaintiff's contention that the change in his work schedule was due either to discrimination or retaliation for his complaining about on-call allocation to Dr. Shemo. Plaintiff now argues

that he was discriminated against because the Defendants failed grant him an exception to the new work schedule but that another physician, Dr. Susan Oh, an Asian female was granted flex time due to an unspecified medical problem.

Initially we note that Plaintiff did not make the argument that he was discriminated against because he did not receive flex time at the summary judgment phase of this matter. Due to Plaintiff's failure to raise this argument in his responsive brief to the summary judgment motion, he has waived it. SeeD'Angio v. Borough of Nescopeck, 34 F. Supp. 2d 256, 265 (M.D.Pa. 1999)(McClure, J.)(Non-moving party waived an argument when he failed to Address it in a responsive brief).

However, even if we consider Plaintiff's argument on the merits, he has made no showing that the Defendants' failure to grant him flex time in the face of the new work schedule was discriminatory. As noted in our February 20, 2007 Memorandum, the change in work schedule was due to the fact that the Hospital was no longer considered a Medicare provider, and a decision was reached to implement a standardized hospital-wide program schedule. (Rec. Doc. 67 at 22-23).[3] Plaintiff's present assertion that Dr. Oh,

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[3] Plaintiff argues that the Defendants failed to produce documents to him during discovery which support the conclusion that the change in work schedule was the re-

an Asian female, was permitted two brief periods off in the afternoon due to medical considerations does not in any way support a claim of racial discrimination by the Plaintiff. Furthermore, Defendants remind us of the testimony of Anthony Montecalvo, the former Chief Medical Executive for the Hospital, that he refused two requests for exeception to the standardized work schedule from Dr. Robert Allen Kirk, a Caucasian male, and Dr. Nunchanart Venbrum, an Asian female. (Rec. Doc. 36, Ex. 12, ¶6). Upon this record, there is simply no evidence that the failure of the Defendants to accommodate Plaintiff's request to alter his schedule was based on a discriminatory animus. Plaintiff's argument in this regard is likewise unavailing.

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sult of a survey conducted by the Health Care Financing Administration which concluded that the Hospital no longer met the standards for being a Medicare provider. (Rec. Doc. 76 at 21). Defendant does not dispute the fact that no documents were produced, but notes that the Evidence in support of this fact was supplied by the declaration of Anything L. Montecalvo (doc. 36, ex. 12, ¶3-4), which was submitted in support of the Defendants' summary judgment motion.Testimonial evidence such as Montecalvo's declaration is an entirely proper form of evidence to be utilized by a Court in aid of disposition of a summary judgment motion. Perhaps we were remiss in not citing to Montecalvo's declaration in our discussion on this point in the Memorandum, but that does not change the existence of the fact or the appropriateness of the testimonial evidence.

4. Mailbox Location

Plaintiff argues that the Court's interpretation that the temporary relocation of Plaintiff's mailbox to a separate location was non-discriminatory is incorrect and that the placement of his mailbox could be "viewed as discriminatory adverse action in intent because his mailbox was the only physician's mailbox moved for unknown reasons." (Rec. Doc. 76 at 21).

We stand by our ruling in our February 20, 2007 Memorandum that the temporary reassignment of Plaintiff's mailbox in a location separate from other doctors' mailboxes does not rise to the level of an "adverse employment action." See *supra*, pp. 5-6. Plaintiff argues that the mailbox move was discriminatory because Dr. Shemo's secretary told Plaintiff that his mailbox was moved because Dr. Shemo did not want his mailbox with the other physician's mailboxes. Even taking that argument as true, Plaintiff also testified at his deposition that Dr. Shemo told her secretary that Plaintiff had to go to the Administrative Building (the place of his new mailbox) anyway to sign in and out. This fact tends to show even more that the movement of Plaintiff's mailbox was not an "adverse employment action," but was rather a simple administrative measure that Plaintiff has attempted to elevate beyond rational measure.

Again, Plaintiff has simply presented no new evidence or law to support his contention that the movement of his mailbox was discriminatory or an adverse employment action. His argument in this regard fails under the exacting standard applied to a motion for reconsideration.

5. Step Cash Payments

Plaintiff also argues that our determination that Plaintiff provided no evidence that the delay in making Plaintiff's step cash payments was motivated by racial considerations is in error. Plaintiff argues that it was the Defendants' burden to show the lack of any racial animus, not his. Plaintiff's interpretation of the parties' respective burdens is incorrect.

The standard for summary judgment is familiar and well-established. Once the moving party has identified evidence which demonstrates the absence of a genuine issue of material fact, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Thus, to survive summary judgment, the non-moving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Serbin v. Bora Corp. Ltd, 96 F.3d 66, 69 n.2 (3d Cir. 1996)(quoting Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986)); Hefron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562, 568-69 (D.N.J. 2003). "If the nonmovant's evidence on any

essential element of the claims asserted is merely 'colorable' or is 'not significantly probative,' the court must enter summary judgment in favor of the moving party." Heffron, 270 F. Supp. 2d at 69 (citing Aderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

Claims of racial discrimination are analyzed under the burden-shifting standard first announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As the Third Circuit Court of Appeals has noted:

> Briefly summarized, the McDonnell Douglas analysis proceeds in three stages. First, the plaintiff must establish a *prima facie* case of discrimination.[4] If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's [termination].[5] Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant

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[4] The plaintiff bears the burden of production to establish the *prima facie* case. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

[5] A defendant bears the burden of production to establish a legitimate, nondiscriminatory reason for the adverse employment action. See Fuentes, 32 F.3d at 763

> were not its true reasons, but were a pretext for discrimination.

Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3dCir. 1999)(citing McDonnell Douglas, 411 U.S. at 802).

Here, as Defendants note, they established a non-discriminatory reason for the delay in the step cash payments for 2002 and 2003, which was an inputting error. We concluded that Plaintiff had not met his burden of proving pretext in the fact of the Defendants' proffered legitimate reason. As noted in our February 20, 2007 Memorandum, Plaintiff provided no evidence other than a "bald conclusion" that the late payment resulted from discrimination or retaliation. (Rec. Doc. 67 at 27). Again, Plaintiff provides us with no new evidence or law to support his argument. Accordingly plaintiff's argument on this point is without merit.

6. Hostile Work Environment/Constructive Discharge and Dr. Shemo

Plaintiff argues for the first time in the instant Motion that Dr. Shemo's allegedly hyper-scrutiny and continuous supervision of his performance constituted a hostile work environment and amounted to a constructive discharge of the Plaintiff. In support of this argument, Plaintiff alleges that Dr. Shemo maintained a lengthy supervisory file for the Plaintiff, that she attempted to charge the Plaintiff

with theft of time and that she attempted to make out a case of leave abuse against Plaintiff.

First we note that none of these facts were alleged in either the complaint or brought to the Court's attention in response to the motion for summary judgment. As Defendants correctly submit, "Plaintiff cannot assign error to this Court for failing to consider facts which were never brought to its attention." (Rec. Doc. 85 at 12). As previously noted *infra* in this Memorandum, Plaintiff's failure to raise this argument at the summary judgment phase of this case essentially results in a waiver.

Even assuming arguendo that Plantiff did not waive this argument by failing to raise it previously, he simply makes no showing that Dr. Shemo's conduct had any adverse effect on him. Plaintiff admits that the information regarding Dr. Shemo's alleged hyper-scrutiny of him and attempts to charge him with theft of time "came to light only during [the] deposition of Dr. Shemo." (Rec. Doc. 76 at 28). One of the elements of a hostile work environment claim is that the Plaintiff must show that the discrimination detrimentally affected him. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996). Plaintiff clearly cannot show that Dr. Shemo's alleged conduct detrimentally affected him, or compelled him to resign, when he was not aware of the same until *after* the institution of the litigation. Furthermore, Plaintiff has offered simply *no* evidence that Dr. Shemo's conduct was

motivated by a discriminatory animus, which is also an essential element of a hostile work environment claim. See Aman, 85 F.3d at 1081. Actions of which Plaintiff was neither aware of nor are shown to be motivated by discrimination do not in combination make out a hostile environment claim. Plaintiff's argument in this regard is unavailing.

7. Continuing Violation Theory

Plaintiff disagrees with our conclusion that he has failed to establish a continuing violation. Plaintiff argues that we "consciously examined each event as a separate incident, without attempting to put any action in context ... in finding that no continuing violation occurred." (Rec. Doc. 76 at 26).

> On page 34 of our February 20, 2007 Memorandum, we *clearly* ruled that:
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> Taking the record as a whole, we do not find that Plaintiff has proffered enough evidence to establish a continuing violation theory. Plaintiff attempts to conflate what he considers to be discrimination in on-call time allocation with other isolated incidents for which he is aggrieved, including the moving of his mailbox, temporary removal of his desk, and

> failure to receive desired office space. Other than the fact that Plaintiff was offended by these incidents, we can find no obvious link or commonality connecting them to a degree where a pattern is discernable. Furthermore, the incidents which Plaintiff alleges to be discriminatory in nature did not occur in a regular fashion, but were isolated incidents scattered throughout a period of years. There is plainly no showing that the incidents were systematic or occurred with even the slightest degree of frequency. We simply do not find that Plaintiff can avail himself of the continuing violation theory with regard to his Title VII claim for discrimination in on-call time allotment.

(Rec. Doc. 67 at 34). Plaintiff's contention that the Court reviewed the evidence in a vacuum is utterly baseless in light of the language of our Memorandum. Despite Plaintiff's argument to the contrary, we did not commit an error of law in considering Plaintiff's proffered evidence of a continuing violation. Plaintiff's argument on this last point is also entirely without merit and necessarily fails.

CONCLUSION:

Therefore, for the foregoing reasons we shall deny the Plaintiff's Motion for Reconsideration. We reaffirm our ruling in favor of the Defendants' on their Motion for Summary Judgment and reiterate our

Finding that no genuine issues of material fact remain.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Reconsideration (doc. 69) is DENIED.

s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX D – MEMORANDUM AND ORDER, DATED FEBRUARY 20, 2007

IN THE UNITED STATES DISTRICT COURT
FOUR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL CLAYTON, Jr., M.D., No. 4:CV 05-0768

Plaintiff, Judge Jones

v.

PENNSYLVANIA DEPARTMENT OFPUBLIC WELFARE, by and Through Their agent ESTELLE RICHMAN, Secretary Department of Public Welfare, At HARRISBURG STATE HOSPITAL By and through their agent, DR. ANN SHEMO, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,

Defendants

MEMORANDUM AND ORDER

February 20, 2007

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

Pending before the Court is Defendants', Pennsylvania Department of Public Welfare, Estelle Richman and Dr. Ann Shemo, Motion for Summary Judgment ("the Motion") (doc. 36) filed on October 6, 2006.

For the following reasons, the Motion (doc. 36) will be granted.

PROCEDURAL HISTORY:

Plaintiff Samuel Clayton, Jr., M.D.("Plaintiff" or "Clayton") commenced this action by filing a complaint (doc. 1) on April 15, 2005. Thereafter on April 22, 2005, Plaintiff filed an amended complaint (doc. 3), to which Defendant filed an answer (doc. 16) on July 6, 2005.

In Count I of the complaint, Plaintiff claims that he was discriminated against on the basis of his race in violation of 42 U.S.C. § 1981. In Count II of the complaint, Plaintiff claims he was discriminated against on the basis of his race as well as retaliated against for his complaints of discriminatory treat-

ment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2001 et seq. In Count III of the complaint, Plaintiff claims he was discriminated and retaliated against in violation of the Pennsylvania Human Relations Act, 43Pa. C. S. § 951 et seq. In Count IV of the complaint, Plaintiff claims that he was retaliated against as a consequence of his internal and EEOC complaints, in violation of § 1981. In the prayer for relief, Plaintiff seeks judgment for back pay, lost compensation, attorney fees and monetary relief, plus costs and interest.

Following the close of discovery, the Defendants filed the instant Motion, which was fully briefed by the parties. The Motion is therefore ripe for our review.

STANDARD OF REVIEW:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED .R. CIV. .P. 56(c); see also Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). The party moving for summary judgment bears the burden of Showing "there is no genuine issue for trial". Young v. Quinlan, 960 F.2d 351,357 (3d Cir. 1992). Summary judgement should not be granted when there is a Disagreement about the facts or the proper inferences which a fact finder could draw from them. See Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a Genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1968). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Federal Rule of Civil Procedure 56 provides that, where such a motion is Made and properly supported, the non-moving party must then show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party Making a sufficient showing as to the essential elements of their case that a Reasonable jury could find in its favor. Celotex Corp., 477 U.S. at 322-23.

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am.,

Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992), cert. denied, 507 U.S. 912 (1993) (citations omitted).

Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original). "As to materiality, the substantive law will identify which facts are material." Id. at 248. A dispute is considered to be genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

FACTUAL BACKGROUND:

This is an action brought by a former employee of the Pennsylvania Department of Public Welfare claiming that he was discriminated against because of his race and retaliated against for filing a PHRC complaint. Plaintiff is an African-American physician who was employed part-time from 1985 until his Retirement on September 26, 2003 at Harrisburg State Hospital, a mental health Facility operated by the Department. Defendant Pennsylvania Department of Public Welfare is an agency of the Commonwealth of Pennsylvania that was Responsible for the operation of the Harrisburg State Hospital at all times relevant to the instant action. Defendant Estelle Richman is and has been the Secretary of Public Welfare since 2003. Dr. Ann Shemo was the

Medical Director at Harrisburg State Hospital from March 2000 until September 2004. She supervised Plaintiff from March 2000 until he retired in September 2003. (Rec. Doc. 37 ¶¶ 1- 4). The hospital closed on June 30, 2006.

Plaintiff filed a charge with the Pennsylvania Human Relations Commission On February 14, 2001. In that charge, he complains that the hospital changed his work schedule. On March 6, 2001, Plaintiff filed an amended charge with the EEOC. In that charge, he complained that he did not receive certain bonuses; that he received less on-call time than other physicians; that the hospital threatened to furlough him; that the hospital placed his mailbox in an isolated place and that his work schedule had changed. (Rec. Doc. 37, ¶¶4-6). Defendants allege that the Plaintiff never instructed the EEOC to cross-file the amended charge with the PHRC, and there is no evidence that the claims were ever cross-filed. (Rec. Doc.37, ¶7).

Our recitation of the facts will now turn to a summary of various incidents Relevant to our analysis which plaintiff alleges were discriminatory.

On-Call Time Allocation

Defendants allege that since at least the mid 1980's, on-call time for Physicians at Harrisburg State Hospital was prorated based on the number of hours worked by the physicians. (Rec. Doc. 37, ¶8). Plaintiff denies this allegation entirely. Plaintiff al-

leges that from 1985 through 1999 there was an "institutional inability to obtain voluntary 'on call' coverage from time to time. Thus initially (1985-1997) 'on call' demands were made on a 'voluntary' basis" and the part-time/full-time had nothing to do with the process. Plaintiff further alleges that he was not "invited" to participate in the process. (Rec. Doc. 53, ¶9).

Defendants allege that Clayton began to receive on-call hours in July 1997, but about a month after he began on-call, his hours began to decrease. (Rec. Doc. 37, ¶¶9, 11-12). Defendants allege that on-call time was briefly equalized between full-time and part-time physicians form August 23, 1999 to October 1999, after which it was reduced to 50% for part time doctors. (Rec. Doc. 37, ¶14). Dr. Davis and Dr. Nwokeji tried to accommodate Dr. Clayton's desire for more on-call time, but the physician's union opposed the accommodation on the ground that a Greater share of the on-call hours should go to the full-time physicians. (Rec. Doc.

37, ¶15). Defendants allege that thereafter, the hospital reinstated the earlier policy of prorating on-call time based on whether the employee was full or part-time.¶¶¶ (Rec. Doc. 37, ¶17).

Furlough

In June 2000, Plaintiff was advised that he would be "bumped" out of his position by another physician as a result of a furlough. At the last minute, he was

advised that he would not be furloughed, and two other physicians, neither of whom were African-American, were furloughed. (Rec. Doc. 37, ¶¶19-22).

Mailbox Location

On July 25, 2000, Plaintiff's mailbox was moved to an isolated area for about a month. The mailbox was moved due to a theft of mail in the Eaton Building, where his mailbox had been previously located. Plaintiff was displeased that his mailbox had not been moved to the Petry Building, where other doctors' mailboxes were located. After Plaintiff returned from an extended leave, he discovered that all of the medical doctors' mailboxes had been moved to the Administrative Building, where his new mailbox location was. (Rec. Doc. 37, ¶¶25-28).

Change in Work Schedule

In the summer of 2000, the Health Care Financing Administration determined that Harrisburg State Hospital no longer met the requirements for participation as a provider in the Medicare program. In response, the hospital management decided to implement a standardized hospital-wide program schedule,

effective September 18, 2000. Under the new schedule Plaintiff and other physicians were required to schedule their work between specified hours from 7:30 a.m. and 4:30 p.m. The new schedule applied to

all medical and psychiatric doctors, as well as social workers and management employees, including personnel staff. (Rec. Doc. 37, ¶¶29-35).

Missing Desk

Early in October 2001, Plaintiff discovered that one of the desks in his office was missing. He later received a note that it had been removed to be restored and that it would not be returned to him. Plaintiff talked to Dr. Montecalve and was able to get the desk back. Plaintiff testified that he had no evidence that the incident was racially motivated beyond his assertion that it was disrespectful. (Rec. Doc. 37, ¶¶41-45).

Office Location

In the fall of 2001, Superintendent Bruce Darney decided to move all of the Physicians offices into the Vista Dome Building. The building had just been air-conditioned and Darney, for management purposes, wanted all the physicians in the same building. When the doctors were moved, Plaintiff was originally assigned to share Room217 with Philip Grem, another part-time doctor. An accommodation was made, however, to allow Dr. Grem to share the room with his wife, Judy Grem, who was also on the staff. Plaintiff testified that Dr. Shemo told him that he could then have Room 207, which was a larger room, but then changed her mind and told him to take a room on the third floor. Dr. Shemo testified that

Room 207 had been allocated to Psychiatric Physicians, and she was not at liberty to give the room to Plaintiff. Ultimately, Dr. Venbrux, a full-time Asian physician, from Thailand, was assigned Room 207. Other physicians who were not African-American were also assigned to the third floor and were not given Room 207, including a white physician and two Asian physicians. (Rec. Doc. 37, ¶¶46-52).

Board Certification Bonus, Fiscal Year 1999-2000

To be eligible for a specialty board certification payment, Management Directive 535.2 Amended required a doctor to be board certified by June 30 of a given year. Under the directive, a doctor must submit evidence of his certification before June 30. Plaintiff did not sit for the examination to become board certified until July 2000, and did not receive a bonus for 1999-2000 fiscal year.

Step Cash Payments

On January 6, 2001, Plaintiff became eligible for a step cash payment. Plaintiff received a step cash payment in that year, however he did not receive one in January 2002 or January 2003. The record was reviewed and an inputting error made on January 29, 2002 was discovered that had prevented the payment from being made. Both payments were subsequently made on September 26, 2003. (Rec. Doc. 37, ¶¶58-60).

Grievances

On February 21, 2003, Plaintiff filed a grievance with the Department. Barbara Casey, the designee of the Chief Executive Officer of the Hospital Responded on March 12, 2003. Plaintiff filed another grievance on March 25, 2003. The Chief Medical Officer of the Hospital responded to the grievance on April 10, 2003. (Rec. Doc. 37, ¶¶ 63-68)

DISCUSSION:

I. Proper Parties

A. Defendants Richman and Shemo

The Defendants argue that Defendants Richman and Shemo may not be held Liable under Title VII. The Defendants further argue that Defendant Richman had no personal involvement in any alleged violation of Section 1981 or the PHRA, and therefore cannot be held liable under those statutes. In the brief in opposition to the Motion, Plaintiff concedes that Defendant Richman should be dismissed as a party to this action due to her lack of personal involvement in the claimed discriminatory action in this litigation. Accordingly, Defe dant Richman shall be dismissed as a party.

Turning to Dr. Shemo, Defendants allege that she cannot be held liable for an alleged Title VII violation. Both parties concede that in general individual employees may not be held liable for discrimination

under Title VII. See Sheridan v. E.I. Dupont de Nemours and Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996)("we are persuaded that Congress did not intend to hold individual employees liable under Title VII").

However, in his brief, Plaintiff cites a Tenth Circuit case for the proposition that an employee personally involved in discrimination could be held liable under Title VII. See Allen v. Denver Public School Bd., 928 F.2d 978 (10th Cir. 1991). Our reading of this case indicates that it plainly does *not* stand for the proposition which Plaintiff argues. Allen does not hold that individuals may be sued under Title VII, but rather that individual employees may be held liable under 42 U.S.C. § 1981.

The precedent in the Third Circuit is clear: individual employees cannot be held liable for discrimination under Title VII. See Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 184 (3d Cir. 1997). Accordingly, Plaintiff's Title VIIClaim against Defendant Shemo shall be dismissed.

B. Defendants Pennsylvania Department of Public Welfare and Harrisburg State Hospital

Defendants argue that the named state entities, Pennsylvania Department of Public Welfare and Harrisburg State Hospital, should be dismissed from Plaintiff's § 1981 brought pursuant to 42 U.S.C. §

1983 and PHRA claims, based on Eleventh Amendment immunity.[1]

Pursuant to the Eleventh Amendment to the United States Constitution, the States are generally immune from suites instituted against them by citizens. See U.S. Const. amend. XI. However, a State can waive its immunity, see Alden v. Maine, 527 U.S. 706, 755 (1999), or Congress may abrogate a States' immunity, so long as it "both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." Bd. Of Trs. Of the Univ. of Alabam v. Garrett, 531 U.S. 356, 363 (2001).

Defendants argue that Plaintiff's § 1981 claims against it should be dismissed because the Commonwealth has not waived its immunity and Congress has not abrogated Eleventh Amendment immunity for§ 1981 claims. The Supreme Court has squarely held that 42 U.S.C. § 1983 does not "override States' Eleventh Amendment immunity." Quern v. Jordan, 440 U.S. 332, 342 (1979). Furthermore, "neither a State or nor its officials acting in their official capacities are 'persons' under § 1983" and therefore States and state officials are immune from § 1983 liability. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1988).

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[1] Pursuant to 71 Pa. Con. Stat. § 61, the Department of Public Welfare is a political subdivision of the Commonwealth. As previously referenced, the Department is responsible for the operation of Harrisburg State Hospital.

Precedent makes clear that Congress has not abrogated Eleventh Amendment immunity for States or state officials who are sued for alleged § 1981 violations. Accordingly, because the Department and the Harrisburg State Hospital are subdivisions of the Commonwealth of Pennsylvania, they are entitled to immunity under the Eleventh Amendment to the United States Constitution and Plaintiff's §1981 claims against those entities will be dismissed.

Pennsylvania courts have ruled that the PHRA waives the Commonwealth's sovereign immunity, thus allowing the Commonwealth to be sued under that Statute in *state* court. See Mansfield State College v. Kovich, 46 Pa. Cmwlth. 339 (1979). However, pursuant to 42 Pa. Cons. Stat. § 8521 (b), the Commonwealth has specifically withheld its consent to federal suit. The Supreme Court has instructed that "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one ...Thus in order for a state statuteor constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (emphasis in original).

It is therefore evident that the Commonwealth retains its immunity from suit in federal court on PHRA claims, and accordingly, the Plaintiff's PHRA

claims against the Department and Harrisburg State Hospital will also be dismissed.

II. Failure to Exhaust

Title VII Claims

Defendants argue that Plaintiff's Title VII claims of loss of bonuses and constructive discharge are outside the scope of his administrative charge, and are, therefore, barred.

Before filing a suit claiming violations of Title VII, a plaintiff must exhaust His administrative remedies by filing a timely discrimination charge with the EEOC. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). A plaintiff's Title VII claims are, thereafter, limited to claims that are within the scope of the original administrative charge. See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). Exhaustion of administrative remedies promotes voluntary compliance without litigation and gives notice to the charged party. See Reddinger v. Hosp. Cent. Servs., Inc., 4 F. Supp.2d 405, 409 (E.D. Pa. 1998).

The test for determining whether a claimant has exhausted administrative remedies is "whether the acts alleged in the subsequent suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom. " Antiol, 82 F.3d at 1295. The determination "turns on whether there is a close nexus Between the facts supporting each claim or whether additional charges made in the Judicial

complaint may fairly be considered explanations of the original charge or Growing out of it." Galvis v. HGOP Serves., 49 F. Supp. 2d 445, 448-449 (E.D. Pa. 1999). This test applies to new acts which occurred during pendency of the Proceedings before the Commission. Angjelino v. New York Times, Co., 200 F.3d 73, 94 (3d Cir. 1999).

At the outset, we note that Plaintiff's March 6, 2001 EEOC charge specifically referenced the fact that Plaintiff had not received bonuses in the past. While Plaintiff may have alleged for the first time in his amended complaint in this proceeding that he did not get a bonus for being Board Certified for Fiscal Year 1999-2000 or that he was denied step cash payments for 2002 and 2003, we find that these allegations, inasmuch as they all relate to not receiving a type of payment, may be considered "growing out of" what was initially charged in the EEOC complaint and decline to dismiss them on failure to exhaust grounds.

Noting that a constructive discharge claim based upon hostile work environment must go beyond a standard hostile environment claim, we also must take into consideration that Plaintiff proceeded in a *pro se* capacity when he filed his initial and amended charges and we are inclined to construe the charges liberally. We accordingly cannot find with certainty at this juncture that Plaintiff is foreclosed from asserting a constructive discharge claim based upon hostile work environment before this Court due to

exhaustion grounds. We shall analyze the merits of these claims later in this Memorandum.

PHRA Claims

Defendants argue that Plaintiff failed to present all but one of state law claims under the PHRC to the state commission: Defendants concede that Plaintiff's change in work schedule claim was properly raised and therefore exhausted.

"To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. If a plaintiff fails to file a timely complaint with the PHRC, then he or she is precluded from judicial remedies under the PHRA." Woodson v. Scott Paper Co., 109 F. 3d 913, 925 (3d Cir. 1997)(citing 43 Pa. Cons. Stat. §§ 959(a), 962), cert. denied, 522 U.S. 914 (1997). A plaintiff may satisfy his or her filing requirement under the PHRA if the EEOC transmits the claim to the PHRC. Id. at 926 n. 12.

As noted, the sole charge Plaintiff brought before the PHRC was his claim of a change to his work schedule. Defendants argue that the remainder of claims that were asserted before the EEOC in the amended charge were never filed with the PHRC because the Plaintiff never instructed the EEOC to cross file the claims, and there is no evidence that the claims were ever cross-filed. Defendants argue that Plaintiff's failure to fully present his state law

claims to the PHRC precludes him from asserting them now.

Defendants further argue that despite the existence of a worksharing agreement between the PHRC and the EEOC, Plaintiffs filing of the amended charge with the EEOC does not satisfy the state exhaustion requirement. The Third Circuit reasoned in Woodson,

> [T]he worksharing agreement allows a plaintiff to proceed in court under Title VII without first filing with the PHRC. That, however, does not mean that a plaintiff can initiate PHRC proceedings as required by the PHRA merely by filing with the EEOC. Whether a plaintiff has initiated PHRC proceedings under the PHRA is a state law issue. The worksharing agreement says nothing abut whether a plaintiff has invoked PHRC procedures if the PHRC has never received his or her claim, nor could it, given that Pennsylvania Supreme Court held in Fye v. Central Transportation Inc., 487 Pa. 137 (1979) that EEOC procedures are not a sufficient surrogate for PHRC remedies.

109 F.3d at 926-27

Plaintiff does not dispute outright that he did not cross-file his amended EEOC charge with PHRC. Instead, he argues that "the documentation from the

EEOC reflects Dr. Clayton's efforts at filing more comprehensive charges. For example, the March 16, 2001 notification from Maria Tomasso, EEOC District Director, acknowledges requests of dual filing of the charges in question with the EEOC and Pa HRC ..." (Rec. Doc. 53, ¶7).

However, our reading of the March 16, 2001 notification indicates that the EEOC had received the initial complaint filed with the PHRC, but does not, in any way, indicate that the EEOC had or was going to cross-file that amended charge of March 6, 2001 with PHRC. That the initial PHRC charge was filed with the EEOC does not mean that the amended EEOC charge was, as a matter of course, filed with the PHRC. In fact, the lack of documentation indicates that no such cross-filing ever occurred.

Inasmuch as Plaintiff simply failed to exhaust any claims, other than his change in work schedule, before the PHRC, all of Plaintiff's other claims under the PHRA are barred based upon failure to exhaust and shall be dismissed.

III. Individual Discrimination Claims

Existence of Adverse Employment Action

In order to establish claims for retaliation or discrimination under Title VII, §1981 or the PHRA, an essential element for the plaintiff to establish is that he was Subject to an adverse employment action. See Jones v. School Dist. Of Philadelphia, 198 F.3d

403-410-412 (3d Cir. 1999).[2] In a discrimination case, the Supreme Court has defined an adverse employment action as "[a] tangible employment action constitute[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits ... A tangible employment action in most cases inflicts direct economic harm." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761-62 (1998). The Third Circuit has defined an adverse employment action under Title VII as an "action by an employer that is 'serious and tangible enough to alter an employee's compensation, terms, conditions or privileges of employment.'" Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004)(quoting Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001)).

To establish an adverse employment action for a retaliation claim, a plaintiff must show that a "reasonable employee would have found the alleged retaliatory actions 'materially adverse' in that they 'well might have dissuaded a reasonable worker from

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[2] To establish a prima facie claim of employment discrimination, a plaintiff must demonstrate that: (1) he is a member of a protected class, (2) that he was subject to an adverse employment action, and (3) that similarly situated members of other racial classes were treated more favorably. See Jones, 198 F.3d at 410-412.

making or supporting a charge of discrimination.'" Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006)(quoting Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2415 (2006)). It is essential to a retaliation claim that Plaintiff establish a causal link between the protected activity and the subsequent adverse employment action. Moore, 461 F.3d at 342.

It their brief, the Defendants discuss each of the incidents of alleged discrimination separately. We shall analyze the merits of Defendants' arguments in turn.[3]

Allocation of On-Call Time

On this claim, Defendants argue that Plaintiff cannot meet the third prong of his prima facie case: that similarly situated members of other racial classes were treated more favorably than he was. Defendants cite the deposition testimony of Dr. Davis, a white part-time physician to support their argument. Dr. Davis testified that he had never

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[3] In his brief, Plaintiff argues that piecemeal analysis of each claim is an inappropriate way to analyze a hostile environment claim. We agree. However, in this section of the Memorandum we are not analyzing Plaintiff's hostile work environment claim, but are analyzing his §1981 discrimination claims. Plaintiff's hostile work environment claim will be analyzed at a later point in this Memorandum.

received equal on-call time to the full-time physicians and that on-call time was allocated on a prorated basis.

Plaintiff argues that Dr. Davis' testimony is not a full or accurate reflection of the on-call practices at the hospital. Particularly, Plaintiff disputes that on-call time was always doled out on a prorated basis. However, a review of the facts indicates that Plaintiff's failure to receive on-call time equal to full-time physician was not based upon racial discrimination, but was due to Plaintiff's status as a part-time physician. Put another way, Plaintiff's bald conclusion regarding the allocation of on-call time is wholly unsupported by the second. It seems entirely logical to the Court, and well within the province of the Hospital, to reward full-time doctors with a larger number of on-call hours. There is nothing discriminatory about this system, and furthermore, it was apparently applied equally to other part-time physicians who were not African American.

Plaintiff has not established that the Defendants on-call allocation system discriminated against him based upon his race and summary judgment will be granted in favor of the Defendants of this claim.

Threatened Furlough

Plaintiff alleges that he was discriminated against by being threatened with a furlough. At the last minute, however, he was advised that he would not be furloughed. Defendants argue that this claim

must fail for two reasons: first because Plaintiff was not, in fact, furloughed, and second because two other physicians, neither of whom were African-American, were furloughed instead.

We agree with the Defendants' argument that plaintiff did not suffer an adverse employment action merely by being told he was going to be furloughed, which he ultimately was not. In no way can we construe the possibility of furlough to be an adverse employment action. Moreover, in light of the fact that other individuals who were not African-American were furloughed in Plaintiff's place, Plaintiff's discrimination claim with regard to this incident fails. Summary judgment will be entered in favor of the Defendants with respect to this claim because Plaintiff suffered no adverse employment action.

Change in Work Schedule

Plaintiff alleges that change in his work schedule were due either to discrimination or retaliation for his complaining about on-call allocation and Dr. Shemo. (Rec. Doc. 3 at ¶¶34, 45). Defendants argue that the changed work schedule was predicated on the fact that in the summer of 2000, it was determined that Harrisburg State Hospital no longer met the requirements for participating as a Medicare provider and as a result, hospital management decided to implement standardized hospital-wide program schedule.

Defendants submit that under the new schedule, Plaintiff and other physicians were required to schedule their work between 7:30 a.m. to 4:30 p.m., although Plaintiff testified at his deposition that the hours were 8 a.m. to 4 p.m. The new schedule applied to all medical and psychiatric doctors at the hospital and also applied to all social workers and management employees including personnel staff. (Rec. Doc. 37, ¶¶29-36). Based upon these factual assertions, which Plaintiff does not dispute, it is clear that Plaintiff cannot show that similarly Situated members of other racial classes were treated more favorably than he was, or that there was any discriminatory or retaliatory motive in instituting this hospital wide policy.[4] Accordingly, summary judgment will be granted in favor of the Defendants on this claim.

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[4] We take this opportunity to note that Plaintiff's submission entitled "Plaintiff's Response to Defendant's Statement of Undisputed Material Facts" (doc. 53) is not an appropriate Submission to the Court. Plaintiff does not properly admit or deny the Defendants' factual averments, but injects misplaced argument within a document that is designed for factual averments. In effect, Plaintiff's misplaced arguments and failure to admit or deny facts to the Court has rendered this submission a practical nullity inasmuch as it is entirely unhelpful and forces the Court to divine whether Plaintiff admits or denies certain facts.

Location of Mailbox/Removal of Desk/Desired Office Location

Plaintiff alleges that he was discriminated and/or retaliated against because his mailbox was moved to a remote location, his desk was removed from his office without notice and he was not given the desired office he wanted. We find that none of these claims constitute adverse employment actions.

As previously noted, Plaintiff's mailbox was moved from the Eaton Building to the Administrative Building following the theft of mail from the Eaton Building. At a point in time after Plaintiff's mailbox was moved to the Administrative Building, all of the other doctor's mailboxes were moved there as well. Plaintiff's desk was taken from his office to be refinished and then given to another physician without notice to him. Plaintiff ultimately received the desk back and there is no indication that the removal of the desk injured Plaintiff in any way. Plaintiff's room assignment in the Vista Dome building was clearly the subject of some juggling. Originally he had been assigned to share Room 217 with part-time physician Philip Grem. An accommodation was made, however, to allow Dr. Grem to share the room with his wife Judy Grem, who was also on the Hospital Staff. According to Plaintiff, Dr. Shemo then told him he could have Room 207, But then changed her mind and told him to take a room on the third

floor. Dr. Venbrux, a full-time physician who is Asian, from Thailand, was ultimately assigned to Room 207. Although the room Plaintiff was finally assigned to was not as large as Room 207, there is no showing that it was insufficient for him to carry out his duties.

None of these incidents qualifies in any way as an adverse employment action. Rather, it appears to us that Plaintiff seeks to elevate rather *de minimis* administrative decisions with which he disagreed to the status of measures that caused him real and cognizable harm. Plaintiff's terms of employment were not altered because of these incidents and he suffered no resulting economic harm. Accordingly, Plaintiff's claims of discrimination regarding these incidents fail as a matter of law and summary judgment will be entered in favor of Defendants.

Denial of Bonus for Board Certification FY 1999-2000

Plaintiff alleges that he was wrongfully denied a bonus for his Board certification for fiscal year July 1, 1999-June 30, 2000. Defendant argues that Plaintiff passed the exam in July, 2000, thereby rendering him ineligible for a 1999-2000 fiscal year bonus.

Defendant submits that the policy, according to Management Directive 525.2 Amended, a doctor must be board certified by June 30 of a given year to be eligible for a specialty board certification payment. Under the directive, a doctor must submit evi-

dence of his certification before *June 30th*. Plaintiff admits that he did not sit for the examination until *July 2000*, therefore he did not and could not have submitted the necessary documents before June 30, 2000.

Plaintiff essentially argues that because he received his certification on July 14, 2000, the Hospital should have retroactively given him a bonus because the submission dates were a "*de minimus* issue." (Rec. Doc. 53 at 18). Plaintiff Submits that "[w]hile the policy does suggest that evidence of certification needs to be mechanically submitted sometime between June 15 and June 30 of a particular fiscal year, no language deals with late submission and other language in the policy suggests that submission of certification may result in pro-ration of entitlement." (Rec. Doc. 53 at 18).

Despite Plaintiff's creative argument to the contrary, it is apparent that Dr. Clayton was ineligible for the certification payment for fiscal year 1999-2000 because he took the test and received the certification *after* the close of the fiscal year. The fact that the directive does not provide for late submission of documents indicates to us that late submissions were clearly not accepted for this type of payment. Accordingly, we cannot find that Plaintiff's failure to receive this bonus was an adverse employment action, because it was a result of his own making. Accordingly, summary judgment will be granted in favor of the Defendant on Plaintiff's claim

for discrimination and/or retaliation based upon his failure to receive the aforementioned bonus.

Untimely Receipt of Cash Payments for 2002 and 2003

Plaintiff did not receive year-end bonuses for 2002 and 2003. He was ultimately paid these bonuses, albeit late. Defendants allege that the late payment was made due to an error, but was in no way motivated by racial animus or a desire to retaliate.

Defendant submits that an inputting error in the bookkeeping system was made on January 29, 2002, which prevented the payment from being made to Plaintiff. Both payments were subsequently made to Plaintiff on September 26, 2003. Plaintiff alleges that the compensation was not paid to him until he had resigned from employment, and essentially that it was only paid to him because had resigned and complained.

However, as his allegations in this regard relate to the proper basis of a discrimination or retaliation claim, it appears that Plaintiff did not suffer from an adverse employment action because he was ultimately compensated, albeit in an untimely fashion. Moreover, Plaintiff provides no evidence, once again other than his bald conclusion, in support of his claim that the late payment was the result of discrimination or retaliation. Accordingly, we shall grant summary judgment in favor of the Defendants on this claim for discrimination and/or retaliation.

Failure to Respond to Grievances

Finally, Plaintiff claims that the Defendants discriminated against him for failing to respond to two grievances Plaintiff filed against Defendant Shemo.

Plaintiff filed his first grievance on February 21, 2003. Barbara Casey, as the Chief Executive Officer's designee responded to the grievance on March 12, 2003. Plaintiff submitted a second grievance on march 25, 2003. The Chief Medical Officer responded to that grievance on April 10, 2003. The Commonwealth responded to union appeals of the grievances. The union then elected not to take these matters to arbitration. (Rec. Doc. 38 at 42).

It is apparent that the hospital management responded to the grievances and Plaintiff's claim of discrimination and/or retaliation with regard to this incident has no merit. Summary judgment on this ground shall be granted in favor of the Defendant on this claim.

IV. Hostile Work Environment and Constructive Discharge Claim Hostile Work Environment

In order to establish a hostile work environment claim under Title VII, Plaintiff must show that (1) he suffered intentional discrimination because of his race; (2) the discrimination was pervasive and regular; (3) it detrimentally affected him; (4) it would detrimentally affected a reasonable person of the same protected class in his position; and (5) there is a ba-

sis for vicarious liability. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996). A plaintiff must show that the discrimination would have detrimentally affected a reasonable person of the same race in his position. Aman, 85 F.3d at 1081. In considering whether the objective test is met, the court should "consider all the circumstances," including "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with the employee's work performance." Harris v. ForkliftSystems, Inc., 510 U.S. 17, 23 (1993); see also Abramson v. William Patterson College of New Jersey, 260 F.3d 265, 280 (3d Cir. 2001).

In support of this claim, Plaintiff asserts that: 1) he was denied equal on-call time in October 1999; 2) he was told he would be furloughed as of June 23, 2000(although he ultimately was not); 3) his mailbox was moved in July 2000; 4) his work schedule was changed in September, 2000; 5) his desk temporarily taken from him in October 2001; 6) he did not receive the office he desired in the Vista Dome building in November 2001; 7) in February and March 2003 he was dissatisfied with the grievances responses from the Hospital management; and 8) he learned did not receive his step cash payments in September 2003.

Defendants argue that Plaintiff's hostile work environment claim must necessarily fail because Plain-

tiff has not proven that the alleged discriminatory conduct was pervasive or regular. Defendants argue further that there is no evidence that any of the alleged incidents were racially motivated.

We agree with the Defendants' submitted argument. A review of the time- line of these incidents alone demonstrates that they occurred rather sporadically over a period of years. The first act with which Plaintiff took issue, the allocation of on-time call, occurred in 1997 and 1999. The next acts, the potential furlough, moved mailbox and change in work schedule occurred in 2000. In 2001, Plaintiff complains of a temporarily missing desk and that he did not receive desired office space. Finally, in 2003 Plaintiff asserts that he was dissatisfied by the grievance system and was denied step cash payments, which he ultimately received. The incidents did not persist at a level that is the hallmark of a hostile work environment. The Defendant was not subjected to a constant barrage of threats or remarks, nor is there any indication that his race was a contributing factor in *any* of the conduct to which he takes offense. See Hanani v. N.J. Dep't of Envtl. Prot., 2006 U.S. App. LEXIS 27960, *22 (3d Cir. 2006)(An Egyptian-born employee did not establish that the alleged discriminatory conduct was severe or pervasive to establish a claim for hostile work environment). Furthermore, the Defendant was not threatened or humiliated in a physical or

emotional manner, and there is absolutely no showing that Plaintiff's work performance was interfered with based upon the alleged incidents.

Accordingly, because we find that the Plaintiff cannot establish that the alleged incidents were severe or pervasive, or that the incidents were objectively detrimental to a reasonable person similarly situated to Plaintiff, or to Plaintiff himself, we shall grant summary judgment in favor of the Defendants on Plaintiff's hostile work environment claims.

Constructive Discharge Claim

To sustain a constructive discharge claim, a plaintiff must prove that his employer knowingly engaged in conduct which foreseeably resulted in working conditions so intolerable or unpleasant that a reasonable person in the employee's position would resign. See Durham Life Ins. Co. v. Evans, 165 F.3d 139, 155 (3d Cir. 1999); Aman, 85 F.3d at 1085. Summary judgment is appropriate if a trier of fact could not reasonably conclude that a reasonable person in the plaintiff's shoes would have felt compelled to resign. Hopson v. Dollar Bank, 994 F.Supp. 332, 340 (W.D. Pa. 1997).

As discussed above, Plaintiff has not established that he was subjected to a hostile work environment, and as a necessary corollary, he cannot establish that his working conditions were so intolerable or unpleasant that he was forced to resign. The incidents Plaintiff complains of were not pervasive, but

were dispersed throughout a period of years. Furthermore, Plaintiff does not show that *any* of the alleged conduct was directed at him based upon his race.

Plaintiff simply has not borne his burden of establishing a constructive discharge claim, and accordingly, summary judgment will be entered against him on this claim.

V. Statute of Limitations

Even assuming *arguendo* that Plaintiff's discrimination claims contained any merit, for the reasons that follow a majority of the claims necessarily fail because they are barred by the applicable statute of limitations.

Title VII Claim of Discrimination Based on On-Call Policy

Defendants allege that Plaintiff's Title VII claim of discrimination by Defendant's policy for the allocation of on-call is barred by the statute of limitations.

The limitations period for a Title VII claim begins to run, under federal law, "when the plaintiff knows or reasonably should know that the discriminatory act has occurred." Uohemeng v. Delaware State Colleg, 643 F. Supp. 1575, 1580 (D.Del. 1986)(quoting McWilliams v. Escambia County School Board, 658 F.3d 326, 330 (5th Cir. 1981)). In a deferral state, such as Pennsylvania, a plaintiff is required to file a

Title VII or ADEA charge of discrimination with the EEOC Within 300 days of the alleged unlawful practice. See 42 U.S.C. §2000e-5(e)(1); 29 U.S.C. §626(d)(2); see also Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000).

Defendants allege that Plaintiff's limitation period for his on-call claims began to run in August or September 1997, when Plaintiff was aware that his on-call time was being reduced. Defendants argue that because Plaintiff's charge was not filed with the EEOC until March 2001, and his §1981 claim was not filed until April 2005, both claims were initiated long after the expiration of the statutory period. Defendants further argue that even if we determine that Plaintiff's claim of discrimination regarding on-call time allocation accrued in October 1999, when, after a brief period beginning August 23, 1999, the on-call time was equalized, Plaintiff's percentage was again reduced to 50 per cent, it is barred by the applicable limitations period, because in that case the Title VII period would have expired in June 2000.

Plaintiff admits that he alleged some conduct falling outside the applicable 300-day federal tolling time frame. Plaintiff argues, however, that the continuing violation theory is applicable to this Title VII claim, and therefore the claim is not time-barred. Under the continuing violation theory, a plaintiff may pursue claims for discriminatory conduct that is time-barred if he or she can demonstrate that the act

is part of an ongoing practice or pattern of discrimination by the defendant. See Rush v. Scott Sepecialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997). When determining whether there is a continuing pattern of discrimination, the Third Circuit has held that a court should consider the subject matter, frequency and permanence of the discrimination:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring ... or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.

Rush, 113 F.3d at 482 (citation omitted).

Taking the record as a whole, we do not find that Plaintiff has proffered enough evidence to establish a continuing violation theory. Plaintiff attempts to conflate what he considers to be discrimination in on-call time allocation with other isolated incidents

for which he is aggrieved, including the moving of his mailbox, temporary removal of his desk, and failure to receive desired office space. Other than the fact that Plaintiff was offended by these incidents, we can find no obvious link or commonality connecting them to a degree where a pattern is discernable. Furthermore, the incidents which Plaintiff alleges to be discriminatory in nature did not occur in a regular fashion, but were isolated incidents scattered throughout a period of years. There is plainly no showing that the incidents were systematic or occurred with even the slightest degree of frequency. We simply do not find that Plaintiff can avail himself of the continuing violation theory with regard to his Title VII claim for discrimination in on-call time allotment.

Therefore, as Defendants submit, even using the *later* of the two dates when Plaintiff was aggrieved over on-call allocation as a measuring stick, the statute of limitations would have run in June of 2000. Accordingly, because Plaintiff's claim was not made until 2001, it is barred by the statute of limitations and summary judgment will be entered in favor of the Defendant.

§1981 Claims

The Original version of the statute presently codified at 42 U.S.C. § 1981 was enacted as §1 of the Civil Rights Act of 1866. It was amended in minor respects in 1870 and recodified in 1874, but its basic

coverage did not change prior to 1991. Initially the statute served to protect the rights of blacks Americans to "make and enforce contracts" with the same freedom and ability as white Americans. However, in 1991, Congress amended the statute defining the term "make and enforce contracts" to include the "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Therefore, after the 1991 amendments were added, §1981 had, in essence, more "teeth" and provided more causes of action to individuals subjected to various forms of racial discrimination. See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 372-373 (2004).

However, in December 1990, Congress enacted 28 U.S.C. § 1658, which created a four year catch-all statute of limitations for federal civil actions. In Jones, the Supreme Court held that § 1658 applied to § 1981 claims. Accordingly, §1981 claims are subject to a four year statute of limitations.[5]

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[5] Prior to the 1991 amendments to §1981, the statute of limitations applied to §1981 claims was borrowed from the statute of limitations for personal injury actions in the state where the alleged violations occurred. The Pennsylvania statute of limitations for personal injury actions is 2 years from the date of accrual.

Defendants argue that each of the ten incidents of discrimination alleged by Plaintiff in his amended complaint are barred by the statute of limitations applied to §1981 claims brought via §1983. The Defendants, however, relied on the two year statute of limitations that was effective prior to Jones. Our review of the claims indicates that some, but not all, are barred by the four year statute of limitations applied to federal civil actions pursuant to §1658.

This action was commenced by Plaintiff on April 15, 2005. Accordingly, all claims accruing prior to April 15, 2001 are time-barred. Plaintiff was "threatened" with furlough in June 2000, and therefore the limitations period ran in June 2004 on this claim. Plaintiff's work schedule was changed pursuant to a policy effective September 18, 2000, and accordingly the limitations period on this claim ran in September 2004. Plaintiff discovered that he did not receive a bonus for fiscal year 1999-2000 in July 2000, therefore the statute of limitations on this claim ran in July 2004. Finally, Plaintiff's mailbox was moved to the Administrative Building on July 25, 2000, and this claim therefore became time-barred on July 25, 2004.

Plaintiff's remaining claims: that his desk was removed without notice form his office in October 2001, he did not receive the office he desired in the Vista Dome building in November 2001, that he was denied step cash payments for 2002 and 2003, and that

he was dissatisfied by the grievance process in 2003 are not barred by the four year statute of limitations pursuant to §1658. However, Plaintiff's discrimination claims for these incidents necessarily fail for the reasons described hereinabove.

CONCLUSION:

Accordingly, for the detailed reasons set forth in this Memorandum, we shall grant the Defendant's Motion for Summary Judgment. An appropriate Order shall issue.

s/ John E. Jones III
John E. Jones III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOUR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL CLAYTON, Jr., M.D., No. 4:CV 05-0768

Plaintiff, Judge Jones

v.

PENNSYLVANIA DEPARTMENT OFPUBLIC WELFARE, by and Through Their agent ESTELLE RICHMAN, Secretary Department of Public Welfare, At HARRISBURG STATE HOSPITAL By and through their agent, DR. ANN SHEMO, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,

Defendants

ORDER

February 20, 2007

In conformity with the Memorandum issued on today's date in the above-captioned matter, it is hereby ORDERED that:

1. The Defendant's Motion for Summary Judgment (doc. 36) is GRANTED to the following extent:

   a. Defendant's Richman is DISMISSED as a party to this action.

   b. Plaintiff's Title VII claims are DISMISSED as against Defendant Shemo.

   c. Counts I, III and the §1981 claim articulated in Count IV are DISMISSED against Defendants Department of Public Welfare and Harrisburg State Hospital.

   d. Summary Judgment is entered in favor of the Defendants and against Plaintiff on Counts I, II, III and IV of the amended complaint.

2. The Clerk is directed to close the file on this case.

s/ John E. Jones III
John E. Jones III
United States District Judge

Supreme Court, U.S.
FILED
JUL 2 2 2009
OFFICE OF THE CLERK

No. 08-1360

In the Supreme Court of the United States

SAMUEL CLAYTON, JR., M.D.,
Petitioner

v.

PENNSYLVANIA DEPARTMENT OF WELFARE, by and through their Agent, ESTELLE RICHMAN, Secretary, Department of Public Welfare; HARRISBURG STATE HOSPITAL, by and through their agent, DR. ANN SHEMO, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "GVR" (Grant/Vacate/Remand) Order should be issued to allow the Court of Appeals to reconsider its decision under the Lilly Ledbetter Fair Pay Act of 2009 where the Court of Appeals held that regardless of petitioner's failure to exhaust, there was no evidence to support a claim of racial discrimination under Title VII?

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STATEMENT OF THE CASE

This case involves multiple claims of racial discrimination brought pursuant to Title VII. The Court of Appeals affirmed the District Court's decision that petitioner's claims (relating to pay for on-call time) were barred for failure to exhaust under this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Congress has now enacted the Lilly Ledbetter Fair Pay Act of 2009 to make each time compensation is paid a new and separate unlawful employment practice. The question presented is whether the Court should vacate the decision of the Court of Appeals and remand the case for reconsideration in light of the Lilly Ledbetter Fair Pay Act of 2009.

1. Petitioner is an African-American physician who was employed part-time at Harrisburg State Hospital (HSH) from 1985 until his retirement on September 26, 2003. Pet. App. at 4a-5a. Respondents are the Pennsylvania Department of Public Welfare (DPW); Estelle Richman, Secretary of DPW; and Dr. Ann Shemo, Medical Director of HSH. *Id.* Since at least the mid 1980's, on-call time was prorated based on the number of hours worked by HSH physicians. *Id.* at 35a-36a. For a brief period of time between August and October of 1999, on-call time was equalized between full-time and part-time physicians. *Id.* at 36a. However, due to objections from the physician's union, the prior policy of prorating on-call time based on whether a physician was full or part-time was reinstated. *Id.*

Under the policy, petitioner was given less on-call time than full-time physicians from October of 1999 until his retirement. *Id.* Dr. Davis, a white part-time physician at HSH, was also never given on-call time equal to that of full-time physicians. *Id.* There is no evidence in the record that other part-time physicians were treated differently from petitioner under HSH's policy for on-call time. *Id.* at 50a-51a. Petitioner also failed to present evidence showing that the policy was "directed at him based upon his race." *Id.* at 62a.

2. On February 13, 2001, petitioner filed a complaint with the Pennsylvania Human Relations Commission. *Id.* at 5a. On March 6, 2001, petitioner filed an amended complaint with the EEOC in which he alleged for the first time that he had been discriminated against under HSH's policy for on-call time. *Id.* The EEOC issued a right to sue letter on January 13, 2005. *Id.*

Petitioner commenced the present action by filing a complaint in the District Court on April 15, 2005. *Id.* at 31a. In his amended complaint, petitioner alleged that he had been subjected to racial discrimination while a physician at HSH in violation of 42 U.S.C. §1981; Title VII, and the Pennsylvania Human Relations Act, 43 P.S. §§ 951, *et. seq.* Pet. App. at 31a. In addition to his claims regarding on-call time, petitioner alleged numerous other acts of discrimination including, *inter alia*, threat of being furloughed, change in work schedule, undesirable office assignment, relocation of mailbox, removal of desk from office, and denial of bonus for obtaining Board Certification. *Id.* at 35a-39a. Petitioner further claimed that the individual acts of discrimination against him were so pervasive that

they amounted to a hostile work environment and that as a result he was constructively discharged from his job. *Id.* at 58a-61a.

The District Court granted summary judgment in favor of respondents on all claims on February 20, 2007. *Id.* at 31a-69a. In reaching its decision, the District Court found that petitioner's claims relating to on-call time were barred by the statute of limitations since the claims would have accrued at the latest in October of 1999 (when HSH reinstated its policy of giving preference for on-call time to full-time physicians) and he did not file his EEOC complaint until 2001. *Id.* at 62a-65a. However, prior to reaching this conclusion, the District Court made a determination on the merits that petitioner could not make out a *prima facie* case of discrimination for his on-call time claim since he produced no evidence that similarly situated members of other racial classes were treated more favorably than he was. *Id.* at 50a-51a. The District Court specifically found that "a review of the facts indicates that [petitioner's] failure to receive on-call time equal to a full-time physician was not based upon racial discrimination, but was due to [petitioner's] status as a part-time physician." *Id.* at 51a. The District Court denied petitioner's motion for reconsideration on June 18, 2007. *Id.* at 13a-29a.

3. In the Court of Appeals, petitioner argued, *inter alia*, that the district court erred in finding that his claims regarding on-call time were time barred. *Id.* at 7a-8a. Petitioner maintained that the HSH's policy regarding on-call time should be construed to be a continuing violation which did not accrue until his retirement in 2003. *Id.* at 8a. Relying on this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,

Inc., 550 U.S. 618 (2007), the Court of Appeals rejected petitioner's position and held that a new violation did not occur under Title VII each time petitioner received a paycheck. Pet. App. at 8a-9a. Accordingly, it agreed with the District Court that petitioner's claims regarding the allocation of on-call time were time barred. *Id.*

However, the Court of Appeals further held that "[p]etitioner is unable to prove that he was subjected to a discriminatory or retaliatory employment action through [the denial of on-call time or any of the other] individual incidents recounted in his claim." *Id.* at 10a. The Court of Appeals specifically concluded that "[t]he record has nine alleged incidents of discrimination spread over a five-year period. None of these incidents was severe or pervasive in nature and none was shown by [petitioner] to have been racially motivated." Pet. App. at 10a-11a. Petitioner filed a petition for rehearing *en banc* which was denied by the Court of Appeals on February 3, 2009. *Id.* at 2a.

REASONS FOR DENYING THE WRIT

There is an alternative basis for affirmance which makes vacating the judgment of the Court of Appeals unnecessary and a waste of judicial resources.

The Court of Appeals relied on *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in determining that petitioner's claims regarding the denial of on-call time were barred by the statute of limitations. Pet. App. at 8a-9a. However, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 on January 29, 2009. The Act provides in relevant part that an unlawful employment practice occurs under Title VII "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Pet. at 3 (quoting 42 U.S.C. § 2000e-5(d)(3)(A)).

Since the Act is retroactive, petitioner argues that its passage has changed the legal standard relied upon by the Court of Appeals in reaching its decision in this case. Pet. at 8. Respondents concede that the Act has expressly abrogated this Court's decision in *Ledbetter* and that to the extent the Court of Appeals relied on the decision in *Ledbetter*, it is now in direct conflict with the Act. Furthermore, if the decision of the Court of Appeals was based solely on the determination that petitioner's claims regarding on-call time were time barred, it would be appropriate to remand the case for the Court of Appeals to reconsider its decision.

However, it is unnecessary to vacate the judgment of the Court of Appeals in this case because the lower courts fully considered petitioner's claims on the merits. The District Court, in a lengthy and detailed decision, found that petitioner could not make out a *prima facie* case of discrimination on his claim regarding on-call time since there was no evidence which would show that similarly situated members of other racial classes were treated more favorably than he was. Pet. App. at 50a-51a. It further determined that the record established that the amount of on-call time petitioner received was not based on racial discrimination but was the result of him being a part-time physician. *Id.* Likewise, the Court of Appeals determined that petitioner was unable to prove that he was subjected to racial discrimination. *Id.* at 10a. Moreover, the Court of Appeals expressly stated that there was no evidence that any of the nine alleged incidents of discrimination which occurred between 1998 and 2003 were racially motivated.[1] *Id.* at 10a-11a.

The District Court and the Court of Appeals determined that petitioner's claims regarding on-call time were barred by the statute of limitations under *Ledbetter*. Given the passage of the Lilly Ledbetter Fair Pay Act of 2009, it would have been appropriate to grant a GVR order if the lower courts had not already fully considered petitioner's claims on the merits. The Court of Appeals has already determined that respondents were entitled to summary judgment because petitioner did not establish his *prima facie*

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[1] On-call time was the first of the nine individual incidents of discrimination which were specifically enumerated by both the District Court and the Court of Appeals.

case. Pet. App. at 10a. This constitutes an alternative and completely sufficient basis for affirming the judgment of the District Court. Accordingly, vacating the decision of the Court of Appeals and remanding the case for further consideration is unnecessary and would be a waste of judicial resources under the facts of this case.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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